

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: [REDACTED]

[REDACTED]

Petitioners,

VS.

Metropolitan Nashville Public Schools,

Respondent.

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No. 00-18

MEMORANDUM OPINION AND FINAL ORDER

JOHN W. CLEVELAND
Administrative Law Judge
TENNESSEE DEPARTMENT OF EDUCATION
120 W. Morris Street
Sweetwater, Tennessee 37874
Phone: 423/ 337-2111

October 6, 2000

MEMORANDUM OPINION

No. 00-18

This cause came to be heard on May 11, 2000, before the Honorable John W. Cleveland, Administrative Law Judge for the Tennessee Department of Education, upon the Due Process Hearing Request filed by the Student's mother and grandfather, the testimony of witnesses and the exhibits filed by the parties. The Petitioners appeared *pro se*, and the Respondent was represented by its staff attorney, Amber St. John. Following the hearing, the transcript was produced by June 5, 2000. One of the Petitioners is blind, and the transcript of the hearing was transcribed into braille for him by June 19, 2000. The parties submitted their briefs by June 30, 2000; and the parties' responses were filed by July 10, 2000.

Identifying information appears on the cover page of this Opinion and on the Final Order, which incorporates this Opinion and is filed with this Opinion. To preserve the parties' privacy in compliance with the Federal Educational Right to Privacy Act ("FERPA")¹, the parties, the schools, the witnesses and other identifying information are referred to by generic descriptions, *e.g.*, the or this "Student," the "School System," the "Supervisor of Special Education." Publication of the cover page of this Memorandum Opinion and Final Order, the Final Order or other identifying information violates federal law.

References to the record of the due process hearing in this matter appear in endnotes, *i.e.*, Exhibit 8, Transcript Page 69, Line 42, which do not contain identifying information, and may be published with this Memorandum Opinion, in the user's discretion.

FINDINGS OF FACT

The Student's Disability

The Student was born [REDACTED], 1986. At the time of the hearing, she was a pretty, physically mature 13-year-old young lady.² She was initially certified as a student in need of special education due to mental disability, but her certification changed to multiple disabilities.³ The Student has an IQ of 40⁴, cerebral palsy⁵, head tics and petit mal seizures⁶, Tourette's Syndrome⁷, attention deficit hyperactive disorder⁸, asthma, voiding dysfunction and chronic kidney problems⁹.

The Student's Speech and Communication

The Student's speech is almost totally unintelligible and incomprehensible. Her speech consists almost entirely of one-word and two-word responses, and except for "yes" and "no," almost none of what she says can be understood by those who do not communicate with her frequently. Her answers to questions frequently just mimic the words that are included in the question itself.¹⁰

The Student's Medication

The Student is supposed to take medication during her school day. The Student's school has not always administered her medication, and it has administered her medication at inappropriate times and in the unprescribed dosages. The School District produced no general policy or specific plan designed to insure that the Student's medication is administered and that its administration is accounted for. The Student's school and the School District misplaced or lost the Student's medical records.¹¹

The Student's General Level of Functioning

The Student sucks her thumb much, if not almost all, of the time, and she is considered to "do well" when she stops sucking her thumb the first time she is asked. The Student is very messy.¹² Normally, she would open her milk carton and she could feed herself, but some days she was very messy. While at breakfast, she poured her chocolate milk into her tray on the table, in her seat and on the floor.¹³ Some days the Student's clothes had to be changed and some days the food and stains were just wiped up.¹⁴ Once when the Student was dressing herself at school, and her aide was dressing another child, the Student brushed against bleach the teacher had put on a table, ruining her green dress, and someone¹⁵ tried to cover up the bleached fabric with magic marker, which was worse than the bleached mark because it was a different green altogether.¹⁶ At times, the Student has been unwilling to follow directions, refusing to sit in her seat during announcements, laughing and flapping her arms during the moment of silence.¹⁷

The Student has had menstrual accidents ruining her clothing,¹⁸ and she has had other accidents urinating in her clothes. Once, as the Student returned to class after she stayed behind to clean up a mess she had made in the cafeteria, the Student stopped for a bathroom break, and in the bathroom she inserted her fingers into her rectum.¹⁹

The Student knows her name, her grandfather's name and her mother's name. She does not consistently recall what she does know. For instance, when she recites her address, she names the correct street, but she doesn't always get the numbers right, and without prompts, she does not always include the city and state. The Student does not remember her zip code or her social security number.²⁰

Inclusion

The Student's IEP provides at Part A that "The Student takes PE and Music with her regular peers. She does have a full-time assistant. She always attempts all activities and does her very best. She is accepted by her peers and has begun some friendships. She also participates in special school functions with activities with regular ed peers;" at Part B that "The Student requires functional curriculum that emphasizes life skills, socialization and communication. Regular middle school is inappropriate to address her needs. Participation in activity-based classes and events will be included in her plan;" and at Part C, "Regular program participation," is marked peer tutoring for "lunch, PE, assembly, school activities and clubs, and Music and Art."²¹

When the Student was to be included with regular education students at lunch, music or physical education, she went with her entire special education classroom. Other classrooms of regular education students were in the lunchroom, but the special ed students sat by themselves at one table. No evidence was presented that the Student's inclusion in music, art, physical education or other activities was any more meaningful than the lunch room experience.²²

Educational Assistant

Part A of the Student's IEP says that the Student has a full-time assistant. Her classroom has one teacher and two assistants for fourteen students.²³ The Student's mother and grand-father have always thought that the Student had a full-time assistant, and until the 1999-2000 school year they had no complaints with the assistant or assistance provided to the Student. The assistant assigned to the Student's classroom in 1999-2000, apparently found assisting another special education student in the Student's classroom less difficult and/or more rewarding. She planned to assist another student in the classroom at the State Fall Special Olympics, leaving the Student without an special education assistant for one or more days. The Student's assistance was instructed by the School District not to attend the Special Olympics with the other student, but apparently she called in sick, and attended anyway.²⁴ From then through the remainder of the school year, the Student had very little help from an assistant even though the assistant continued to be assigned to her classroom.²⁵

The School District counts its "peer tutors" as a special education assistant for the Student for math and reading. These "peer tutors" are eight to ten regular education students who work one-on-one with the special education students on their math and reading lessons for the day.²⁶ Apparently the Student also received assistance with the computer and word processor from "peer tutors."²⁷ The one-on-one assistance provided for the Student in pre-vocational skills, which consisted largely in cleaning and straightening up the lunchroom after a meal, self-help and social adaptation, was "shadowing" her to help her serve herself meals, go to the bathroom, *etc.* The Student's speech teacher was counted as the Student's one-on-one assistant for speech.²⁸

The Student's Behavior

Consideration was given to including in the Student's IEP a behavior plan that would include appropriate disciplines short of suspension. On several occasions, the Student was isolated in "time-out," but she often became disruptive, pushing things off a desk, pushing chairs around and generally being disruptive. For a period of time another special education teacher would walk with the Student or take her to the teacher's classroom to calm her down. The Student could not control this disruptive behavior.²⁹ The School District did not evaluate whether the Student's behavior was caused by her disability, try to determine what triggers in the Student's environment preceded the Student's disruptive behavior or develop a systematic behavior management program to educate the Student to react to those environmental triggers with appropriate behavior.

Suspensions

The Student had not ever been suspended prior to the 1999-2000 school year.³⁰ On January 26, 2000, the Student was suspended for one day for fighting with another student.³¹ The exact nature of the incident is uncertain, but it appears that the Student grabbed the other student's shirt, and she may have pinched him in the face, in an unprovoked attack.³² On March 1, 2000, the Student was suspended for one and one-half days for grabbing another student and refusing to let go.³³ On March 6, 2000, the Student was suspended for two days for hitting one student and trying to bite another student at a when there were at least three teachers there.³⁴

There was never an educational assistant present when the Student attacked the other students.³⁵ Because the suspensions were of short duration, no educational services were provided to the Student during her suspension.³⁶

The Student was transferred to a nearby high school on April 5, 2000.³⁷ The Petitioner agreed to the Student's transfer under her current IEP, but not the continuing absence of a full-time one-on-one assistant for the Student.³⁸

The Student's Individual Education Plan

The Student's IEP is ambiguous as to whether or not the Student is to have a full-time one-on-one educational assistant. The IEP can be read, page by page, to say that a one-on-one educational assistant is needed for some objectives but not others. The IEP clearly calls for a one-on-one educational assistant to work toward certain goals and objectives, *i.e.*, cognition, fine motor, reading and language skills³⁹, work behaviors, dexterity, assembly tasks, following a verbal schedule that for set up and completion of pre-voc tasks, social adaptation, self-help, personal independence, pre-vocational, increased personal independence and increased social responsibility, off-campus trips involving work-related or life skills⁴⁰, participate in a variety of inclusions, school-based activities and special programs.⁴¹ The service code "14," the designation for a full-time one-on-one assistant for every skill⁴², a service code "14" does not appear under Section F, Direct Special Education on Page 5 of the Student's IEP.⁴³

Evaluations

The Student was evaluated in 1993 when she was 6 years 10 months old⁴⁴, in 1995 when she was 9 years 3 months old⁴⁵ and 1999 when she was twelve years 7 months old.⁴⁶ The Wechsler Intelligence Scale 304 measures intellectual functioning, the average being 100 with a standard deviation of 15 points. Scores between 85 and 115 falling in the average range. The Vineland Adaptive Behavior Scales measures skills in communication, daily living and socialization, resulting in a composite adaptive behavior score. The Vineland average score is also 100 with a standard deviation of 15 points.⁴⁷

The Student's performance measured by her evaluations has been consistent:⁴⁸

<u>Evaluation of</u>	<u>1993</u>	<u>1995</u>	<u>1999</u>
Intelligence	45	40	40
Communication, Daily Living & Socialization	~ 40	61	34
Language		≤40	58
Fine Motor Skills		≤44	45

This Student's performance measured by these standardized tests falls within a narrow range at the lowest percentiles; therefore, even changes in the Student's measured performance that might have statistical significance, are, as a practical matter, inconsequential. For instance, the only statistically significant change in the Student's scores is in language, yet the Student's vocabulary and articulation are unintelligible.⁴⁹

This 14-year-old Student's scores indicate that the Student's skills would be best characterized as those possessed by a typical kindergartner.⁵⁰ The Student is not likely to ever be able to communicate with people in business and on the streets who are unfamiliar with speech difficulties and patterns of communication to live independently.⁵¹ The Student's speech and communication problems are directly related to her intelligence. She might someday be able to make some choices of foods at a grocery, but she will not likely ever be able to independently perform the math functions and to keep up with groceries to shop for herself. Familiarity with people who might support the Student in her environment and repetition of the activities will help her, but her testing, her past performance and her development indicate that there is little chance that the Student will ever function beyond the second grade level⁵², and she will never be able to perform such ordinary tasks, such as grocery shopping, independently.⁵³

The focus of a realistic plan for the Student is for her to become semi-independent in a sheltered environment, so that she would have opportunities to work in settings where transportation would be provided in order to avoid becoming isolated, to contribute in whatever way she can and to interact with people in the general population.⁵⁴ Even if the Student were to successfully achieve all the goals of the most rigorous, realistic series of IEPs over the next four to six years, she will almost certainly need constant supervision.⁵⁵ A reasonable student to staff ratio for the Student would not exceed eight students to two or three staff. The Student needs a combination of very direct support, somebody teaching her a task, and, then, after that, she needs a staff person to monitor to make sure the task is being performed effectively and that the Student is meeting the requirements of her task. In the Student's range of ability, a reasonable goal would enable her to initially learn a task in a work setting from a single individual, with a lot of support, and then begin to generalize and work with one other person and possibly with as many as three other people.⁵⁶

The person who instructs and supervises the Student's instruction needs to be a special education teacher knowledgeable about how to introduce tasks, how to order them in steps and when to fade back to teach the Student to become independent or semi-independent on a task. The support and follow-up can be taught to paraprofessionals. However, the supervisory role must remain, and paraprofessionals should not be turned loose to do support and follow-up. The School District's paraprofessionals have to at least have a high school degree.⁵⁷ There is always an obligation that the school system has to provide supervision to make sure that those more subtle, but very important components of the program are taken into account, like pacing how fast or slow to go, when to introduce new tasks to the students, when to pull back and allow the student to become semi-independent or fully independent.⁵⁸

CONCLUSIONS OF LAW

IDEA⁵⁹ requires that Tennessee, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education."⁶⁰ IDEA mandates that participating states provide such education for all children "regardless of the severity of their handicap."

⁶¹ In pertinent part, the Act defines a free appropriate public education as:

special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, and (D) are provided in conformity with the individualized education program⁶²

The term "related services" includes "such developmental, corrective and other supportive services ... as may be required to assist a handicapped child to benefit from special education...."⁶³ Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP).⁶⁴ The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive.⁶⁵ An IEP is "more than a mere exercise in public relations;"⁶⁶ indeed, it is the "centerpiece of the statute's education delivery system for disabled children."⁶⁷

The Supreme Court's Opinion in Rowley

All discussions of the substantive protections of IDEA begin with the Supreme Court's opinion in *Board of Education v. Rowley*.⁶⁸ Because the School System bases its case on *Rowley*, and the Petitioners' claim implicitly invokes *Rowley* and its progeny, resolution of this case rests in the context of *Rowley* and those cases that interpret its standard.

Rowley concerned an eight-year-old deaf child, Amy Rowley, whose parents requested a full-time interpreter to assist her in school. The school district's refusal to provide this service under IDEA generated the dispute. Amy possessed some residual hearing and was an excellent lip reader. She was an above average student who performed at the level of her grade and was advancing from grade to grade in her regular public school classroom. Because of her hearing disability, she could only understand about 60% of what transpired in class. Nevertheless, she performed impressively in a "mainstreamed" classroom.

The school had made substantial efforts to assist Amy. Before her arrival at school, a number of administrators learned sign language to communicate with her. At the time of her request for a full time interpreter, the school was already providing Amy with a special FM hearing aid, speech therapy and tutoring for the deaf. In addition, Amy's parents, who also were deaf, could communicate with the school by a teletype machine specifically installed in the principal's office for that purpose.

The Supreme Court held that Amy was not entitled to a private interpreter as part of her IEP under IDEA even though she could not follow 100% of the class' activities without such extra assistance. The Court analyzed IDEA and held that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, ..., the child is receiving a 'free appropriate public education' as defined by the Act."⁶⁹ The Court thus explained that the purpose of the Act was to provide a basic level of educational opportunity, not to provide the best education money can buy.⁷⁰

The *Rowley* Court acknowledged that:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education *only* to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such ... supportive services ... as may be required to assist a handicapped child to benefit from special education." §1401(17). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.⁷¹

The Supreme Court in *Rowley* held that the education must "provide educational benefit." The Court thus recognized that each disabled child must be ensured "a basic floor of opportunity" that is defined by an individualized program that confers benefit. But *Rowley* was a very narrow opinion for a disabled student who progressed successfully from grade to grade in a "mainstreamed" classroom, which is certainly not the case of this Student.

The Court itself limited its opinion to the facts before it:

We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.⁷²

The *Rowley* Court described the education that must be provided under IDEA as "meaningful." The use of the term "meaningful" indicates that the Court expected more than *de minimis* benefit. We note in this regard that the facts of *Rowley* clearly indicate that the "benefit" Amy Rowley was receiving from her educational program was substantial, and that "some benefit," in the case of Amy, meant a great deal more than a negligible amount. *Rowley* is distinguished from the case of this Student because of the type of services requested. Unlike the services of a full-time interpreter for Amy Rowley, the assistance rendered by a full-time one-on-one educational assistant, as discussed above in [refer to the findings of fact section with the school system's special ed. supervisor's description of the importance of the assistant], is an essential part of the Student's education without which it is impossible for her to acquire any meaningful benefit from her education. It is an integral part of what Congress intended by "appropriate education" as defined in IDEA.

The School System highlights the standard established in *Rowley*, that schools must provide specialized educational services to handicapped children sufficient to confer some educational benefit upon the handicapped child,⁷³ and states are not required to "maximize the potential of handicapped children."⁷⁴ The child must be provided access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.⁷⁵

The *Rowley* standard is recognized and honored by the Sixth Circuit Court of Appeals.⁷⁶ The court determined that the *Rowley* threshold is appropriate and the school system meets that standard by developing an IEP that is reasonably calculated to provide educational benefits. The Sixth Circuit recently affirmed this position.⁷⁷ The School System suggests that the Petitioners seem to desire a "Cadillac" education, but that the School System is required to provide only a "Chevrolet" education.⁷⁸

The School System's Brief did not include the second half of the colloquial standard, "... but the 'Chevrolet' has to have an engine." While *Rowley* notes that states are not required to "maximize the potential of handicapped children,"⁷⁹ the Sixth Circuit has held that the educational benefits the state does confer must be more than *de minimis* in order to be "appropriate."⁸⁰ The standard is satisfied and the child is provided a 'free appropriate public education' as defined by IDEA with "personalized instruction *with sufficient support services to permit the child to benefit educationally from that instruction.*" (Emphasis added.)⁸¹

The School System points out that only certain goals in the Student's 1999 IEP require one-on-one assistance, and the Student's 2000 IEP requires one-on-one assistance for even fewer goals.⁵² For those goals requiring one-on-one assistance, the Student received assistance from an educational assistant,⁵³ from peer tutors,⁵⁴ from an occupational therapist twice each week for one-half hour and from a speech therapist once a week for one-half hour.⁵⁵ The School System contends that, in conformity with case law and IDEA regulations, it provided sufficient support services to permit this Student to benefit educationally from her instruction through the services of an educational assistant in those instances required by the Student's IEP.

Because of the severity of the Student's disabilities and qualitative differences from those of Amy Rowley, it is difficult to apply *Rowley* here. The Student's progress cannot be measured by advancement in grade or acquisition of academic skill. Her needs are drastically different, but no less important. See *Rowley*, 458 U.S. at 202, 102 S.Ct. at 3049 ("It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."). The educational benefit, if any, conferred upon the Student by the School System's IEP and its implementation must be measured by the Petitioners' complaints regarding the educational assistance provided, the Student's inclusion with regular education students, the School System's response to the Student's behavior and the Student's educational progress.

I. Educational Assistance.

The School System argues that the Student's IEP calls for one-on-one assistance for only a limited number of goals in a limited number of subjects, e.g., a single goal in reading recognition.⁵⁶ These instructional and assistance requirements of the Student's IEP are performed: (a) by one of two assistants who share special education 14 students under the supervision of a single special education teacher⁵⁷, (b) peer tutors assisted special education students one-on-one during math and reading⁵⁸ and (c) speech therapy consultation.⁵⁹

A reasonable student to staff ratio for the Student would not exceed eight students to two or three staff. The Student needs a combination of very direct support, somebody teaching her a task, and, then, after that, she needs a staff person to monitor to make sure it's being done effectively and that she's meeting the requirements.⁶⁰ This is not a description of one-on-one assistance necessary for a specific goal in a specific subject, it is the support that is necessary for the Student to benefit from her education. One special education teacher with two assistants for 14 students almost doubles the recommended student/teacher ratio. Twice the ratio means half the attention. Inevitably, one or more students will not be provided the services required by her IEP, and as occurred with the trip to the Special Olympics in this case, the student denied will likely be the student with more demanding disabilities.

The person who instructs and supervises the Student's instruction needs to be a special education teacher knowledgeable about how to introduce tasks, how to order them in steps and when to fade back to teach the Student to become independent or semi-independent on a task. The support and follow-up can be taught to para-professionals. However, the supervisory role must remain, and para-professionals should not be turned loose to do support and follow-up.⁶¹ An education paraprofessional is an individual with at least a high school diploma who provides special education services under the supervision of a licensed or certified professional. Education para-professionals must meet the professional and employment standards of the State Board of Education, including completion of 20 hours of continuing training each year.⁶² Needless to say, the students who participate in "peer instruction" with the Student are not education paraprofessionals.

II. Inclusion.

General least restrictive environment of IDEA, and the regulations promulgated pursuant thereto, require schools to educate children with disabilities with children who are not disabled to the maximum extent appropriate, and to maintain special classes, separate schooling or remove children with disabilities from the regular educational environment only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁹³

"[T]he 'least restrictive environment' provision states only that schools must establish procedures to assure that to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled."⁹⁴ The Sixth Circuit's "benefit to the disabled child" test finds mainstreaming inappropriate "if the disabled child would not benefit from mainstreaming; or if any marginal benefit from mainstreaming would be outweighed by the benefits gained from services that could not feasibly be provided in the non-segregated setting; or if the disabled student would be a disruptive force in the mainstreamed setting."⁹⁵

The Student's IEP says that "Regular middle school is inappropriate to address her needs. Participation in activity-based classes and events will be included in her plan."⁹⁶ The School System contends that the Student participated in physical education with regular ed students and did whatever the regular education students did, she also attended art and music with regular education students and she was in the cafeteria for lunch at the same time regular education students were there for lunch.⁹⁷

When the Student went to lunch, music or physical education, she went with her entire special education classroom. Other classrooms of regular education students were in the lunchroom, but the special ed students sat by themselves at one table. No evidence was presented that the Student's inclusion in music, art, physical education or other activities was any more meaningful than the lunch room experience.⁹⁸

The School System uses regular education students as tutors for its special education students and calls it reverse inclusion.⁹⁹ The School System offers no legal or education authority for reverse inclusion. Least restrictive environment is meant to keep children with disabilities in regular education environment - not to bring regular education students into a special education environment.

This Student's assessments reveal moderate mental retardation¹⁰⁰ and achievement levels at approximately six months into kindergarten grade level in a regular education program.¹⁰¹ The Student, at 14 years of age, can perform skills that can be categorized as skills that a typical kindergartner would perform.¹⁰² The School System believes that this Student would not benefit from more mainstreaming than her current program provides. The School System is probably right that the Student might not benefit from more of the same kind of segregated "mainstreaming" described in the record of this case.

Segregation of special education students from regular education student in the same room for lunch, physical education, music and art is not inclusion, but exclusion. Segregation of special education students in special education classes where regular education student come to tutor is not inclusion, but exclusion. IDEA mandates that a primary goal of the Student's education is to foster self-sufficiency.¹⁰³ The Student's IEP should be designed to teach skills that foster personal independence, encourage dignity for handicapped children, and provide individualized assistance geared toward teaching basic life skills and self-sufficiency early in life, which may benefit the public as these children grow to become productive citizens.¹⁰⁴ The Student's lunch and education in Music, Art and physical education should include the Student as an integrated part of each of those regular education classes – not as part of a segregated special education group that happens to be in the same room at the same time the regular education class is taught. The former is inclusion, the latter is nothing more than mere access to the schoolhouse door.

III. Behavior.

The IEP requirements of IDEA emphasize the importance of three core concepts, including the preparation of students with disabilities for employment and other post-school activities.¹⁰⁵ When a child's behavior "impedes his or her learning or that of others," the IEP team must consider "positive behavioral interventions, strategies, and supports to address that behavior."¹⁰⁶

The Student's behavior became inappropriate on an inconsistent basis during the second semester or near the end of the school year. If a child's behavior impedes his or her learning or that of others, the IEP team shall consider strategies to address that behavior, including positive behavioral interventions, strategies and supports.¹⁰⁷

The School System argues that the behavior demonstrated by the Student was inconsistent and unusual for her. (Cite to School System Brief.) The School System refers only to those behaviors which resulted in the Student's suspension. The School System takes too narrow a view of behavior as that which is violent or disruptive or breaks the school rules rather than the way in which the Student responds to certain stimuli in her environment. Clearly, all the behaviors described in the findings on pages 2 and 3 hereinabove regarding the Student's general level of functioning, behavior and suspensions, impede the Student's learning. In fact, training and modification of the Student's behavior may be the largest single part of her education.

The School System suspects that the Student's behavior may possibly be related to "things" beyond her control, suggesting her violent behavior may result from changes in the identity or dosage of her medication. There is no behavior plan in the record, and the allusions to a plan apparently refer only to a schedule of graduated punishment. A more likely explanation for the Student's behaviors, both her violent behavior and her more prevalent inappropriate behavior, many of which are consistent with her intellect and social development, and is that her behavior results from her disabilities. The Student's IEP must include a strategy to identify (and if possible help the Student identify) stimuli in her environment that trigger inappropriate behaviors, teach the Student appropriate responses, train her to refrain from inappropriate responses and enforce the training by practice and re-enforcement.¹⁰⁸

A key concern of and primary justification for IDEA lay in the important goal of fostering self-sufficiency in handicapped children.¹⁰⁹ IDEA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise – the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.¹¹⁰

Implicit in the legislative history's emphasis on self-sufficiency is the notion that states must provide some sort of meaningful education – more than mere access to the schoolhouse door. We acknowledge that self-sufficiency cannot serve as a substantive standard by which to measure the appropriateness of a child's education under the Act.¹¹¹ Indeed, Christopher Polk is not likely ever to attain this coveted status, no matter how excellent his educational program. Instead, we infer that the emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom – enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society. Therefore, the heavy emphasis in the legislative history on self-sufficiency as one goal of education, where possible, suggests that the "benefit" conferred by IDEA and interpreted by *Rowley* must be more than *de minimis*.¹¹²

The School System cites 34 C.F.R. §300.520 as authority to suspend special education students and emphasizes that the Student was suspended on three separate occasions for less than ten school days in all and IEP services need not be provided for suspensions of less than ten (10) days in a school year. Once again the School System's pre-occupation with discipline of the Student, in the sense of punishment, misses the point that the Student's self-discipline, in the sense of training her to modify her own behavior, must be an important part of her IEP and her education. Unless the Student learns social skills to respond to her environment in ways more appropriate than those of a typical kindergartner, any education benefit the School System might confer on her will not be meaningful. The failure to include an appropriate behavior modification plan in the Student's IEP and implement that behavior plan in her education, denies the Student a free, appropriate public education.

IV. Meaningful Educational Benefit

*Polk v. Central Susquehanna Intermediate Unit 16*¹¹³ examined the contours of the "free appropriate public education" requirement of IDEA, as it touches on the delivery of a "related service" under IDEA. The parents of Christopher Polk, a child with severe mental and physical impairments, claimed that the local school district violated IDEA because Christopher's special education program was inadequate because it failed to provide direct "hands-on" physical therapy from a licensed physical therapist once a week, which hindered Christopher's progress in meeting his educational goals. The *Polk* Court reviewed *Rowley*, and noted that the *Rowley* standard has been interpreted and applied in the context of a severely impaired child in *Board of Education v. Diamond*.¹¹⁴

The *Diamond* court rejected the argument that when the Supreme Court in *Rowley* referred to "some benefit," it meant any benefit at all even if the child regressed. The case involved a child, Andrew Diamond, with severe physical, neurological and emotional handicaps. Despite evidence that Andrew's learning skills were deteriorating and his behavior was becoming counterproductive, the state resisted transferring Andrew from his placement in a day program to a placement in a residential program. Thus, the very argument made by the School System in this case, was expressly rejected in *Polk* and *Diamond*.

The School District's legal argument is that it is obliged by governing law to provide no more for Andrew Diamond than will be "of benefit" to him. The governing law, however, clearly imposes a higher standard.¹¹⁵

After observing that "the *Rowley* standard of enabling one to achieve passing marks and advance from grade to grade probably is not achievable for Andrew," *id.*, the *Diamond* court observed:

Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational progress is likely. The School District's "of benefit" test is offered in defense of an educational plan under which educational regression actually occurred. Literally the School Board's plan might be conceived as conferring some benefit to Andrew in that less regression might occur under it than if Andrew Diamond had simply been left to vegetate. The Act, however, requires a plan likely to produce progress, not regression or trivial educational advancement. *Id.* The teaching of *Diamond* is that, when the Supreme Court said "some benefit" in *Rowley*, it did not mean "some" as opposed to "none." Rather, "some" connotes an amount of benefit greater than mere trivial advancement.

Indeed, defendants' distinction of *Diamond*, if carried to its logical conclusion, would arguably render that case more expansive because progress for some severely handicapped children may require optimal benefit. As we noted in *Battle*,¹¹⁶ severely handicapped children (unlike normal children) have a strong tendency to regress. A program calculated to lead to non-regression might actually, in the case of severely handicapped children, impose a greater burden on the state than one that requires a program designed to lead to more than trivial progress. The educational progress of a handicapped child (whether in life skills or in a more sophisticated program) can be understood as a continuum where the point of regression versus progress is less relevant than the conferral of benefit. Therefore, *Diamond*'s holding is not limited to an issue of progress or regression but it requires that the educational benefit conferred be more than *de minimis*.¹¹⁷

The School System emphasizes the language in *Rowley*,¹¹⁸ that states are not required to "maximize the potential of handicapped children," and IDEA provides no more than a "basic floor of opportunity ... consist[ing] of access to specialized institutions and related services which are individually designed to provide educational benefit to the handicapped child." (Cite to School System Brief.) The Sixth Circuit, however, has adopted the *Polk* interpretation of the *Rowley* standard. The educational benefits the state gives must be more than *de minimis* in order to be "appropriate." *Tullahoma City Schools*,¹¹⁹ *Doe B and Through Doe v. Smith*,¹²⁰ *Daugherty v. Hamilton County Schools*,¹²¹ "The standard is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."¹²²

In this case, the Student gained in functional math skills and prevocational skills during the 1999-2000 school year, being able to run errands to the office for her special education teacher.¹²³ The School System notes that the Student has made some progress under her IEPs, as evidenced by tests showing increases in her vocabulary comprehension¹²⁴ and testimony from her classroom teacher showing gains in functional math skills and prevocational skills.¹²⁵


The Student's IQ has not changed significantly since 1995. The Student's skills in communication, daily living and socialization have not changed significantly since 1995. The Student's language skills have not changed significantly since 1995. The Student's fine motor skills have not changed significantly since 1995.¹²⁶ At chronological age 6 years 10 months, the Student functioned on the level of a child as old as 4 years 3 months.¹²⁷ At chronological age 13 years 2 months, the Student functioned on the level of a child between age 2 years 7 months up to age 4 years 3 months.¹²⁸ The descriptions of the Student's language, communication and social skills in her 1993, 1995 and 1999 evaluations are virtually indistinguishable. The Student's skills and adaptive behavior have not kept pace with her chronological age.¹²⁹ The two adjectives used by the School System itself to describe the educational benefit conferred upon the Student are "some" and "limited." Two more apt descriptions are "trivial" and "minimal."

The danger of the School System's application of the *Rowley* standard to this Student is that, under its reading of *Rowley*, the conferral of any benefit, no matter how small, could qualify as "appropriate education" under IDEA. Congress did not anticipate that states would engage in the idle gesture of providing special education designed to confer only trivial benefit. The School System argues that the Student has made "some" "limited" progress, but considering the record as a whole, it is clear that the Student has made very little, if any, meaningful progress in years.

The School System argues that, regardless of the efforts of the school system, the Student will require rather consistent supervision throughout her life.¹³⁰ Implicit in the School System's argument is the point that efforts to provide the Student a meaningful educational benefit – more than *de minimis* – may be futile. The Student will likely never function at any level significantly higher than that at which she now operates. However, Congress intended to afford children with special needs an education that would confer meaningful benefit. Indeed, the needs of children like the Student are paramount under IDEA. "IDEA provides that the most severely handicapped children be served first."¹³¹ The possibility that the Student may never achieve the goals set in a traditional classroom does not undermine the fact that her brand of education (training in basic life skills) is an essential part of IDEA's mandate."¹³²

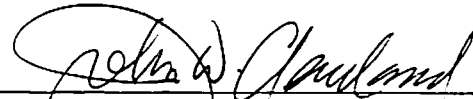
CONCLUSION

The Student has been denied an appropriate education under IDEA because her IEP and the educational services provided under her IEP have not been designed to confer a meaningful educational benefit on the Student. For all the foregoing reasons, the Student's IEP team should develop an individual education plan designed to meet the unique needs of the Student, including but not limited to, a qualified full-time, one-on-one paraprofessional education assistant, a professionally-designed positive behavior plan, and four years of compensatory education, one of which shall be provided during extended school years so long as the Student participates in educational programs provided in public school buildings.


JOHN W. CLEVELAND
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum Opinion and Final Order filed in this case were served upon all adverse parties at interest in this case or their counsel of record by placing a true copy of same in the United States Mail, addressed to said parties or their counsel at their offices, with sufficient postage thereon to carry the same to its destination, *to-wit:* [REDACTED] Nashville, Tennessee 37216, and Amber St. John, 204 Metropolitan Courthouse, Nashville, Tennessee 37201, on October 6, 2000.



JOHN W. CLEVELAND

Administrative Law Judge

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: [REDACTED])
[REDACTED])
Petitioners,) No. 00-18
VS.)
Metropolitan Nashville Public Schools,)
Respondent.)


FINAL ORDER

This case came to be heard on May 11, 2000, before John W. Cleveland, Administrative Law Judge, on the Petitioners' due process hearing request, the testimony of witnesses, the exhibits filed by the parties and the record as a whole, from all of which the Administrative Law Judge makes the findings of fact and reaches the conclusions of law set forth in his Memorandum Opinion, which is filed herewith and incorporated herein by reference as fully and completely as if set forth verbatim.

IT IS THEREFORE ORDERED as follows:

1. The School System shall convene an IEP Team to develop a new Individual Education Plan for the Student no less restrictive than the Student's current IEP including a professionally-developed positive behavior plan, incorporating interventions, strategies and supports to address the Student's behavior.
2. The Student's IEP shall provide the Student with a qualified full-time, one-on-one ("velcro") paraprofessional education assistant.
3. The School System shall provide the Student with four (4) years of compensatory education, the equivalent of one of which shall be provided during extended school years so long as the Student participates in educational programs provided in public school buildings, so that the Student's eligibility for special education services will effectively be extended to age 24.

ENTER this 6th day of October, 2000.



JOHN W. CLEVELAND
Administrative Law Judge

NOTICE

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court under provisions of Tennessee Code Annotated §49-10-601. Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of entry of this Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed.

ENDNOTES

1. 20 U.S.C. §1232(g).
2. Transcript Page 310, Exhibit 23.
3. Transcript Pages 91-92 and 303.
4. Transcript Pages 304-305.
5. Transcript Page 67.
6. Transcript Pages 21 and 124.
7. Transcript Pages 124-126, 303 and 330-331.
8. Transcript Pages 303 and 331.
9. Transcript Pages 83, 331 and 162, Collective Exhibit 18.
10. Transcript Pages 29 and 315-316.
11. Transcript Pages 129 and 252.
12. Transcript Pages 7 and 205.
13. Transcript Page 280.
14. Transcript Page 205.
15. *The magic marker was most likely applied by the Student herself.*
16. Transcript Pages 65-66.
17. Transcript Page 280.
18. Transcript Page 141.
19. Transcript Page 280. *This behavior was only discovered once, but it is too bizarre to be overlooked. It is disturbing that a referral or evaluation did not result from this activity which is often associated with emotional and/or psychological problems.*
20. Transcript Pages 226-227.
21. Transcript Page 180.
22. Transcript Pages 98-99.
23. Transcript Page 198.

24. Transcript Pages 36-37, 44, Collective Exhibit Number 3, and 272.
25. Transcript Pages 36-37.
26. Transcript Page 201-202 and 207.
27. Transcript Page 220.
28. Transcript Page 221-222.
29. Transcript Pages 295-298.
30. Transcript Page 276.
31. Transcript Pages 35, 54 and 57, Collective Exhibit 5.
32. Transcript Page 63, Exhibit 6.
33. Transcript Page 110 and 114, Exhibit 13.
34. Transcript Page 115-123, Collective Exhibit 14.
35. Transcript Page 282.
36. Transcript Page 233.
37. Transcript Page 135.
38. Transcript Page 137.
39. Transcript Page 164, Collective Exhibit 18 and Page 190.
40. Transcript Page 165, Collective Exhibit 18.
41. Transcript Page 166, Collective Exhibit 18.
42. Transcript Page 174. *Referred to in the School District vernacular as a "velcro" assistant.*
43. Transcript Page 174-175.
44. Transcript Page 332. Collective Exhibit 27
45. Transcript Page 332, Collective Exhibit 26.
46. Transcript Page 310-311, Collective Exhibit 23.
47. Transcript Page 310, Collective Exhibit 23, and Page 334.
48. Transcript Pages 333-340.
49. Transcript Pages 29 and 315-316

50. Transcript Page 309.
51. Transcript Pages 316-317.
52. Transcript Page 242.
53. Transcript Page 318.
54. Transcript Pages 320-321.
55. Transcript Page 321.
56. Transcript Page 325.
57. Transcript Page 328.
58. Transcript Page 329.
59. *The Act has been amended and reauthorized since its initial enactment in 1970. This Opinion refers to the original Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 and all of its amendment, as well as the re-authorization as the Individuals with Disabilities Education Act (IDEA-97), as IDEA.*
60. 20 U.S.C. §1412(1).
61. 20 U.S.C. §1412(2)(C).
62. 20 U.S.C. § 1401(18).
63. 20 U.S.C. §1401(17).
64. 20 U.S.C. §1401(16).
65. 20 U.S.C. §§1401(19) (defining IEP). §1414(a)(5) (requiring an IEP).
66. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1570 (11th Cir. 1983), vacated in part on other grounds, 468 U.S. 1213, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1983), reinstated in relevant part, 740 F.2d 902 (1984), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985)
67. *Honig v. Doe*, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).
68. 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).
69. 458 U.S. at 189, 102 S.Ct. 3042.
70. See *id.* at 197 n. 21, 102 S.Ct. at 3046 n. 21.
71. *Id.* at 200-01, 102 S.Ct. at 3048.

72. *Id.* at 202, 102 S.Ct. at 3049.
73. *Id.* at 3048; School System Brief at Page 3.
74. *Id.* at 3042; School System Brief at Page 3.
75. *Id.* at 3048; School System Brief at Pages 3-4.
76. *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (Tenn. 1993).
77. *Daugherty v. Hamilton County Schools*, 21 F. Supp. 2d 765, 771, 130 Ed. Law Rep. 715 (E.D. Tenn. 1998). judgment affirmed (6th Cir. July 30, 1998).
78. *Id.* 460; School System Brief at Page 4.
79. 458 U.S. at 189, 102 S.Ct. at 3034.
80. *Doe By and Through Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989) and *Tullahoma City Schools*, 9 F.3d at 459. (quoting *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034.)
81. *Rowley*, 458 U.S. at 189, 102 S.Ct. at 3042; *Doe*, 879 F.2d at 1341; see also, *Thomas*, 918 F.2d at 620 n. 5 and *Daugherty* at 773.
82. School System Brief at Page 6; Transcript Page 163-166.
83. School System Brief at Page 6; Transcript Page 198.
84. School System Brief at Page 6; Transcript Page 201.
85. School System Brief at Page 6; Transcript Pages 178 and 223.
86. School System Brief at Page 6; Transcript Page 191, Exhibit 19.
87. Transcript Page 198.
88. School System Brief at Page 6; Transcript Pages 201 and 207.
89. School System Brief at Page 6; Transcript Page 175.
90. Transcript Page 325.
91. Transcript Page 328.
92. See. 20 U.S.C. §1111g(3), 34 C.F.R. 300.26 and Draft Rules of State Boards of Education Rule 0520-1-9-.01(35).
93. 34 C.F.R. §Sec. 300.550.
94. *Hudson v. Bloomfield Hills Public Schools*, 910 F.Supp. 1291, affirmed at 108 F.3d 112 (March 1997).

95. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1982).
96. Transcript Page 180 and Page 162. Exhibit 18.
97. School System Brief at Page 7. Transcript Pages 203-204.
98. Transcript Pages 98-99.
99. School System Brief Item 25, Transcript Page 222-223.
100. Transcript Pages 304-305.
101. Transcript Page 308.
102. Transcript Page 308-309.
103. *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. at 3048 n. 23 (quoting extensively from the legislative history of IDEA concerning self-sufficiency).
104. See H.Rep. No. 332, *supra*, at 11 ("with proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society"); 121 Cong.Rec. 19492 (1975) (remarks of Senator Williams); *id.* at 19505 (remarks of Senator Beall).
105. 34 C.F.R. Part 300, Appendix A, Introduction.
106. 20 U.S.C. §141 4(d)(3)(B)(i).
107. 34 C.F.R. §300.346(a)(2).
108. For an illustration of one type of difficulty that may confront a mentally handicapped citizen with impaired speech, which is very expensive for society, see *State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000).
109. See H.Rep. No. 332, 94th Cong., 1st Sess. at 11 (1975) ("taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions"); *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. at 3048 n. 23 (quoting extensively from the legislative history of IDEA concerning self-sufficiency).
110. See H.Rep. No. 332, *supra*, at 11 ("with proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society"); 121 Cong.Rec. 19492 (1975) (remarks of Senator Williams); *id.* at 19505 (remarks of Senator Beall). *Polk* at ¶ 53.
111. See *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. at 3048 n. 23.
112. *Polk* at ¶¶ 45-69.
113. 853 F.2d 171 (3d Cir. 1998). *Polk* is the seminal case for much of the discussion of meaningful progress and educational benefit throughout this Memorandum Opinion. Sentences and perhaps

even paragraphs have made their way from *Polk* into this Opinion virtually undisturbed, sometimes with interior citations intact without a citation to *Polk*. The Third Circuit standard set out in *Polk* is also the Sixth Circuit standard.

114. 808 F.2d 987, 991 (3d Cir. 1986).
115. *Diamond* at 991.
116. 629 F.2d at 269
117. *Polk* at ¶ 65.
118. School System Brief at Page 3, 102 S.Ct. 3034, 3049; 458 U.S. 176, 203-04 (1982).
119. 9 F.3d at 459.
120. 879 F.2d 1340, 1341 (6th Cir. 1989).
121. 21 F.Supp.2d 765, 773, 130 Ed. Law Rep. 715 (E.D. Tenn. 1998), judgment affirmed (6th Cir. July 30, 1998).
122. *Doe*, 879 F.2d at 1341 (emphasis added); see also *Thomas*, 918 F.2d at 620 n. 5 (quoting *Doe*, 879 F.2d at 1341). *Daugherty* at 773.
123. School System Brief at Page 16, Transcript Page 226.
124. Transcript Pages 334-335.
125. Transcript Page 226.
126. Transcript Pages 333-340.
127. Transcript Page 332, Exhibit 27.
128. Transcript Page 311, Exhibit 24.
129. Transcript Page 334.
130. School System Brief at Page 14; Transcript Page 330.
131. See 20 U.S.C. §1412(3).
132. See, *Polk* at ¶ 58.